Supreme Court, U. S.
FILED
SEP 23 1977
MICHAEL RODAK, JR., CLERK

Nos. 76-1724, 76-1841 and 76-1842

In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

HOME BOX OFFICE, INC., ET AL.

AMERICAN BROADCASTING COMPANIES, INC., PETITIONER

v.

HOME BOX OFFICE, INC., ET AL.

NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER

v.

HOME BOX OFFICE, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

JOHN H. SHENEFIELD,
Assistant Attorney General,

BARRY GROSSMAN,
WILLIAM D. COSTON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statute and regulation involved	3
Statement	3
Argument	11
Conclusion	21

CITATIONS

Cases:

Action for Children's Television v. *Federal Communications Commission*, C.A.D.C., No. 74-2006, decided July 1, 1977, rehear denied, August 24, 1977	20
Bates v. *State Bar of Arizona*, No. 76-316, decided June 27, 1977	17
Capital Broadcasting Co. v. *Mitchell*, 333 F. Supp. 582, affirmed *sub nom. Capital Broadcasting Co.* v. *Acting Attorney General*, 405 U.S. 1000	17
Columbia Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94	18
Linmark Associates, Inc. v. *Township of Willingboro*, No. 76-357, decided May 2, 1977	17
National Association of Theatre Owners (NATO) v. *Federal Communications Commission*, 420 F. 2d 194, certiorari denied, 397 U.S. 922	4, 9, 15, 16

Cases—Continued

	Page
Red Lion Broadcasting Co. v. *Federal Communications Commission*, 395 U.S. 367	16, 17
Sangamon Valley Television Corp. v. *United States*, 269 F. 2d 221	10, 19
United States v. *Midwest Video Corp.*, 406 U.S. 649	4, 8, 10, 12, 13, 14
United States v. *Southwestern Cable Co.*, 392 U.S. 157	4, 8, 10, 12, 13
Wisniewski v. *United States*, 353 U.S. 901	20

Constitution, statutes and regulations:

United States Constitution, First Amendment	4, 12, 16, 18
Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*:	
Section 1, 47 U.S.C. 151	3, 14
Section 2(a), 47 U.S.C. 152(a)	3
Section 3(a), 47 U.S.C. 153(a)	3
Section 3(b), 47 U.S.C. 153(b)	3
Pub. L. 94-553, Section 111, 90 Stat. 2550-2558	16
5 U.S.C. 553(b)	19
47 C.F.R. 73.643	3, 6, 7
47 C.F.R. 76.225	3
47 C.F.R. 76.225(b)	10, 11
47 C.F.R. 76.225(c)	10, 11
47 C.F.R. 76.225(d)	10, 11

Commission Orders:

First Report and Order, 20 F.C.C. 2d 201	5

Commission Orders—Continued

	Page
Fourth Report and Order, 15 F.C.C. 2d 466	3
Memorandum Opinion and Order, 23 F.C.C. 2d 825	5
Memorandum Opinion and Order, 60 F.C.C. 2d 858	13
Notice of Proposed Rulemaking, 15 F.C.C. 2d 417	4
Notice of Proposed Rule Making and Memorandum Opinion and Order, 35 F.C.C. 2d 893	5

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OPINIONS BELOW

The opinion of the court of appeals (FCC App. 1-122)[1] is not yet reported. The orders of the Federal Communications Commission (FCC App. 123-234) are reported at 52 F.C.C. 2d 1, 54 F.C.C. 2d 797, and 35 P&F Radio Reg. 2d 767.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1977 (FCC App. 243-246). The petition in No. 76-1724 was filed on June 4, 1977, and the petitions in Nos. 76-1841 and 76-1842 were filed on June 23, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350.

QUESTIONS PRESENTED

1. Whether the administrative record provides a rational basis for the Federal Communications Commission's regulations restricting the program material that may be offered in subscription cablecasting ("pay cable") service.

2. Whether, in adopting regulations that confer valuable commercial advantages on conventional broadcast television by defining the conditions under which pay TV and pay cable service may be authorized, officials of the Federal Communications Commission were required to avoid *ex parte* communications concerning the proposed rules during the informal

[1] "FCC App." refers to the Appendix in No. 76-1724.

rulemaking proceedings, or to make such communications part of the public rulemaking record so as to permit public comment on the private representations.

STATUTE AND REGULATION INVOLVED

Sections 1, 2(a), 3(a) and (b) of the Communications Act of 1934, 48 Stat. 1064-1065, as amended, 47 U.S.C. 151, 152(a), 153(a) and (b), are set forth at FCC App. 251-252. The subscription cablecasting regulations, 47 C.F.R. 76.225, and the subscription television regulations, 47 C.F.R. 73.643, are set forth at FCC App. 227-234.

STATEMENT

After thirteen years of study, the Federal Communications Commission in 1968 issued regulations restricting the kinds and quantity of programming that could be broadcast by subscription television operators ("STV or pay TV").[2] *Fourth Report and Order*, 15 F.C.C. 2d 466. Those regulations prohibited such operators from broadcasting certain feature films, certain sports events, and "series type" programs. In addition, no more than 90 percent of STV programming could consist of feature films and sports events, and no commercial advertising could be shown. *Id.* at 597-598. The Commission reasoned that the scarce radio spectrum space to be used by STV should

[2] STV involves the use of the radio spectrum to broadcast a scrambled television signal which, on payment of a fee, subscribers are authorized to unscramble by use of a device attached to their television set (FCC App. 124, ¶ 3).

not carry the same material already shown on commercial broadcast television, but should instead enlarge the diversity of programming available to the public. *Id.* at 556, ¶ 284 and 566, ¶ 313. Moreover, the Commission feared that if pay TV stations were permitted to show feature films, sports events, and offer series-type programming, those formats would not be available for viewing on "free" conventional broadcast television. The Court of Appeals for the District of Columbia Circuit upheld the restrictions against a First Amendment challenge on the ground that the restrictions were justifiable under the Commission's responsibility to regulate the radio spectrum. *National Association of Theatre Owners ("NATO")* v. *Federal Communications Commission*, 420 F. 2d 194 (C.A.D.C.), certiorari denied, 397 U.S. 922.

In the meantime, the Commission had initiated a new inquiry into the role cable television systems could play in national communications. *Notice of Proposed Rulemaking*, 15 F.C.C. 2d 417. That proceeding resulted, *inter alia*, in regulations requiring that cable systems distributing broadcast television signals ("CATVs") must also engage in "cablecasting" by originating programs and by setting aside channels for public access.[3] Unlike CATV service, cablecasting does not use radio signals.[4] At that time the Commission declined to extend the STV programming restrictions to cablecasting. It found that such restrictions were not necessary to protect the public interest in broadcasting and thus would not be appropriate "unless and until experience gives some indication of a trend calling for action in the public interest." *First Report and Order*, 20 F.C.C. 2d 201, 204. Less than a year later, however, without explaining the change in policy, the Commission in 1970 imposed restrictions upon "pay cable" that were nearly identical to those imposed on STV. *Memorandum Opinion and Order*, 23 F.C.C. 2d 825.

2. In 1972 the Commission denied petitions for reconsideration of its pay cable format restrictions, but nevertheless opened a new docket to reconsider the rules.[5] More than 140 comments addressing the propriety of program fare restrictions on pay cable were submitted in the proceedings (FCC App. 130, ¶ 23). Ruling that STV and pay cable should be uniformly regulated, the Commission amended the STV rules, and extended to pay cable offered by CATVs identical format restrictions. *First Report and Order*, 52 F.C.C. 2d 1 (FCC App. 123-204), modified, *Second Report*

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[3] These regulations were sustained in *United States* v. *Midwest Video Corp.*, 406 U.S. 649. The Commission's jurisdiction to regulate the distribution by CATVs of television broadcast signals was sustained in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157.

[4] Pay cable involves the closed-circuit cable distribution of programming for which the subscriber is charged an additional per program or per channel fee beyond the regular monthy fee charged for the basic cable TV service.

[5] *Notice of Proposed Rule Making and Memorandum Opinion and Order*, 35 F.C.C. 2d 893, 896.

and Order, 35 P&F Radio Reg. 2d 767 (FCC App. 219-234).

The rules, as finally modified (FCC App. 219-234), prohibited exhibition by pay cable (47 C.F.R. 76.225), or STV (47 C.F.R. 73.643), of (1) feature films more than three but less than 10 years old (unless under contract to and available for showing by commercial television or unless foreign without subtitles or dubbing); (2) particular sports events (*e.g.*, Super Bowl, World Series, Kentucky Derby) shown on broadcast television within the previous five years; and (3) more than a certain number of certain other sports events (*i.e.*, regular season with pre-scheduled participants), with the number to be determined by reference to several factors.[6] The rules also required that no more than 90 percent of total cablecasting hours, on a yearly basis, could consist of feature films and sports events. Finally, the rules prohibited commercial advertising during and between pay cable programs (FCC App. 227-234).[7]

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[6] The factors to be considered were: whether the games are home or away, pre-season or season; whether broadcasters carried more or less than 25 percent of the games in the previous five years; a percentage of games not broadcast; and a "high-water mark season" factor. For a demonstration of how the number of non-specific sports events available to pay cable would be calculated, see Brief in Opposition of Respondents Home Box Office, *et al.*, p. 10 n. 16.

[7] As adopted in the *First Report and Order, supra* (FCC App. 194), the rules had also barred the distribution to subscribers of all series programs (*i.e.*, programs with interconnected plot or substantially the same cast of principal characters). The series prohibition, however, was subsequently re-

The Commission concluded that the public interest required such restrictions in order to preserve for "free" broadcasting the types of mass appeal programming upon which it currently relies (FCC App. 164-165, ¶¶ 144-145, and 171, ¶ 161). It expressed concern that if STV and pay cable were permitted unrestricted access to films and sports events, subscription operations would "siphon off" such programming by outbidding "free" conventional broadcast television for these rights. This, it feared, would (1) foreclose the showing on conventional television of these popular formats in areas not reached by subscription operations, and (2) deny such programming to those too poor to afford it.

3. Some fifteen parties petitioned for review of the Commission's orders.[8]

The court of appeals, in a lengthy *per curiam* opinion (FCC App. 1-122), sustained amendments to the STV regulations (47 C.F.R. 73.643) but remanded those rules to the Commission for consideration of the effects of extensive *ex parte* contacts which, the court found, may have tainted the proceedings. However,

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voked by the Commission in its *Second Report and Order, supra* (FCC App. 219-234).

[8] The United States, as statutory respondent, opposed the Commission in the court of appeals. It contended that, as applied to all-cable service, the anti-competitive consequences of the restrictions had not been justified by record evidence under the public interest standard the Commission must apply; and that the considerations that justify restrictions on pay TV—effective use of scarce broadcast frequencies—were inappropriate to all-cable service.

the court vacated the pay cable rules as arbitrary, capricious and unlawful on the record before it.

The court held that the Commission had exceeded its jurisdiction to regulate cable television under the standards of *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 667-668, and *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 173-176, for two principal reasons: because the record did not show that the objectives to be achieved by imposing restrictions on the program material which may be cablecast are also objectives for which the Commission could legitimately regulate the broadcast media; and because the Commission had failed to show that the harm which its regulations seek to remedy actually exists (FCC App. 37-56).

The court reasoned that since the Commission denies that it has authority to regulate the program format of conventional broadcasters, it cannot regulate the programming of cable casts that do not use the radio spectrum (FCC App. 45-52). It also found that the no-advertising rules and 90 percent limitation on feature films and sports events, adopted to confine cablecasting to a role supplemental to conventional broadcasting, were unjustified because such restrictions were not necessary to assure diversity in use of the crowded radio spectrum (FCC App. 54-56). Insofar as the Commission sought to prevent "siphoning" of program material from conventional television, the court found that the record failed to show that "siphoning" will actually occur or that programming would be withdrawn from the poor (FCC App. 52-56,

61-68). It further found that the record did not disclose the factual grounds upon which the Commission had purported to balance the effects of competition between cablecasters and broadcasters for program material against any established need for restrictive regulation of all-cable programming (FCC App. 75).

In addition, the court held that under the First Amendment, restrictions on the material that may be shown to cable subscribers can be justified only to the extent necessary to assure the right of the viewing public to have access to the various kinds of programming. But, it found, the present record failed to show grounds for such a restriction on cablecasters, or for limiting the audience that program-suppliers and advertisers may address. The regulations were also found to be more restrictive than necessary (FCC App. 75-91).

The court upheld the amendments to the subscription television rules on the basis of its 1969 decision in *NATO*, *supra* (FCC App. 108-112).

Finally, the court found that the pay cable and subscription television rules may have been tainted by *ex parte* contacts, particularly during the period between the close of oral argument on the rules and the adoption of the Commission's first report and order in March 1975 (FCC App. 92-108). The majority held (*ibid.*) that in informal rulemaking, all *ex parte* contacts concerning the proceedings should be prohibited once a notice of proposed rulemaking has been issued, unless the substance of such contacts is incorporated into the public file of the rulemaking

docket.[9] Since the court had completely vacated the cable restrictions, however, it gave no further consideration of the effect of its *ex parte* ruling on those rules.[10] Applying *Sangamon Valley Television Corp.* v. *United States*, 269 F. 2d 221 (C.A.D.C.), however, the court remanded the record to the Commission with instructions to conduct an evidentiary hearing concerning the effect of the *ex parte* contacts on the STV amendments (FCC App. 108).

In seeking a stay subsequent to the court of appeals' decision, the Commission determined "that it would seek no further review of its pay cable movie rules and asked [the court of appeals] to remand the comparable subscription broadcast television rule * * * to it so that it could be revoked" (FCC App. 247). The court of appeals granted this motion and stayed its mandate insofar as it vacated the Commission's regulations (47 C.F.R. 76.225(b), (c) and (d)) restricting the cablecasting of sports events, requiring that not more than 90 percent of the total pay cable programming hours consist of feature films and sports events combined, and forbidding commercial advertising announcements during pay cablecasts (FCC App. 247-249).

[9] Judge MacKinnon, in a subsequently issued concurrence (FCC App. 117-122), stated that such a requirement was proper in this case because the rules involved the competitive grant of valuable business advantages. He would not apply the majority's standard to informal rulemaking not involving such matters.

[10] The court's decision concerning the failure of the present record to meet the requirements of *Southwestern Cable* and *Midwest Video* expressly noted that following remand the Commission might meet those requirements on a proper record (FCC App. 56). Since the CATV regulations were vacated, the court apparently assumed that if a new CATV proceeding were initiated, it would be conducted without *ex parte* contacts.

ARGUMENT

1. Since the Commission has abandoned the feature film restriction, petitioners seek review of the court of appeals' decision only insofar as it vacates the pay cable regulations (47 C.F.R. 76.225 (b), (c) and (d)) (FCC App. 232-234) restricting the sports events which may be cablecast, requiring that not more than 90 percent of cablecast programming hours consist of feature films and sports events combined, and prohibiting commercial advertising in connection with pay cable. (See Statement, *supra*, p. 10.) We submit that on this record there is no reason for further review of the Commission's truncated restrictions.

1. *a.* The court of appeals' decision clearly leaves open to the Commission the option of developing an adequate record. Its decision concerning the Commission's jurisdiction to restrict the programming materials available to cablecasters expressly noted (FCC App. 56):

> We do not hold that the Commission must find express statutory authority for its cable television regulations. * * * However, we do require that at a minimum the Commission, in developing its cable television regulations, demonstrate that the objectives to be achieved by regulating cable tele-

> vision are also objectives for which the Commission could legitimately regulate the broadcast media. Where the First Amendment is involved, more will be required. * * * Further, we require that the Commission state clearly the harm which its regulations seek to remedy and its reasons for supposing that this harm exists. Because our holding is so limited, it is possible that the Commission will, after remand, be able to satisfy the jurisdictional prerequisites for regulating pay cable television.

b. Although petitioners contend that the court of appeals has applied erroneous jurisdictional, evidentiary and First Amendment standards, it is evident that the court of appeals' ruling rests upon the inadequacy of the evidence in the record, and of the Commission's assessment thereof, to support the restrictions the Commission has imposed on what cablecasters may exhibit to their subscribers.

Petitioners do not dispute the court of appeals' observation that "the Commission may only exercise authority over cable television to the extent 'reasonably ancillary' to the Commission's jurisdiction over broadcast television" (FCC App. 38). See *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 670; *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 178. Under this standard, the test is whether the Commission's regulation of cable services would " 'further the achievement of long-established regulatory goals in the field of television broadcasting.' " *Midwest Video Corp., supra*, 406 U.S. at 654, 667-668 (opinion of Brennan, J.). See also *Southwestern*

Cable, supra, 392 U.S. at 172-178. The cablecasting rules do not involve a service that uses any part of the radio spectrum. Cablecasting does not extend television signals outside the system of broadcast channel allocations developed by the Commission as in *Southwestern Cable.* Nor does the Commission here assert "that subscription cable television will divide audiences and revenues available to broadcast stations in such a manner as to put the very existence of these stations in doubt" (FCC App. 44). Moreover, since these rules operate to restrict cablecasting service, rather than to require that this service be established or expanded, the rules do not contribute to the diversification of programming available to television and cable audiences. Cf. *United States* v. *Midwest Video Corp., supra*, 406 U.S. at 668-670.

Instead, the purpose of the rules is simply to prevent competition by cablecasting for material likely to be shown on conventional advertiser-supported television. But, as the court of appeals noted, neither the Commission's decision nor the evidence in the record shows how this purpose furthers any legitimate goal of the Communications Act (FCC App. 43). Insofar as the Commission contends that it is authorized to regulate program format and content to maintain present levels of public enjoyment on "free" television, the Commission's position is inconsistent with its own expressed view that it has no power to require broadcasters, which are not common carriers, to obtain Commision permission before commencing particular program formats. *Memorandum Opinion and Order*, 60 F.C.C. 2d 858.

Even if it is assumed that the danger of siphoning justifies exercise of regulatory powers over cablecasting greater than those that the Commission can exercise over broadcasting (cf. *Midwest Video Corp.*, *supra*, 406 U.S. at 681, Douglas, J., dissenting), the record here does not support the Commission's conclusion. For, as the court of appeals noted, it does not contain evidence showing that particular program formats are sufficiently unique to be unavailable to conventional broadcasting if they are first shown by cablecasts. Nor does it contain data indicating public preference for the formats the rules seek to reserve to conventional broadcasting (FCC App. 49-52). Thus, insofar as the Commission contends that its anti-siphoning rules are necessary because cable television will in the foreseeable future serve only a limited audience and not constitute a nationwide communications service (see Section 1 of the Communications Act, 47 U.S.C. 151), the record does not show how distribution of materials to the limited cable audience in a particular area will forestall broadcast of that same material by television stations in markets not served by the cable system. The court of appeals properly rejected the mathematical models submitted by some networks to prove the likelihood that "siphoning" will occur, because they relied upon non-comparable data: *i.e.*, projections of cablecasters' nationwide income in comparison to historical expenditures by broadcast networks. The data also disregarded the possibility that conventional television may enjoy profits that enable it to pay more for feature films and sports

material than it presently pays (FCC App. 61-66). Moreover, the record does not show that "siphoning" would deny free broadcast programming to the poor, since the only consequence of a first showing of material by cablecasters in an area is that subsequent broadcast showings might be delayed (see FCC App. 66-67). In sum, the need for the anti-siphoning rule has not been demonstrated on the record.

Similarly lacking adequate evidentiary support are the no-advertising rule and the requirement that no more than 90 percent of subscription cable service be devoted to feature films and sports events. The Commission did not evaluate these rules in terms of the nature of cablecasting service. Instead, they were mechanically extended to that service, after they had previously been applied to subscription broadcast television, in order to assure that pay TV would be confined to a supplemental role (FCC App. 54-55). But such an approach ignores the fact that the Commission's power over pay TV rests upon its responsibility to allocate scarce spectrum resources (*NATO*, *supra*). This rationale is wholly inapplicable to cablecasting, which does not use the radio spectrum, and which has an abundance of channels available to increase the diversity in services available to the public (FCC App. 54-56). The no advertising rule, moreover, is apparently inconsistent with the Commission's expressed concern for assuring services to the poor, because the rule effectively bars cable firms from offering advertising that could lead to a reduction in pay cable subscription charges.

In addition to the foregoing inadequacies, the record did not disclose the grounds upon which the Commission balanced the desirable effects of increased competition between the cable and television industries against any adverse consequences of that competition which might justify regulation. The regulation could not be justified to prevent "unfair competition" by cablecasters. Under the new copyright law cablecasters and broadcasters alike will pay royalties for copyrighted material, including rebroadcast of TV signals. Pub. L. 94-553, Section 111, 90 Stat. 2550-2558. Moreover, insofar as non-copyrighted material like sports events is involved, there is no evidence that cablecasting competition threatens fragmentation of audiences that might destroy conventional television.

The court of appeals' analysis of the First Amendment issue similarly turns upon the inadequacy of the record to support governmental restrictions upon what cablecasters may offer to their subscribers. Cablecasting restrictions that effectively suppress the right of the public to hear and of producers to speak cannot be justified on the ground that they are necessary to prevent abuse of the radio spectrum. Cablecasting does not use the radio spectrum and cable operators are not licensees of a scarce and valuable public resource. The rationale of *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, and of the *NATO* case, *supra*, therefore, cannot be extended to cablecasting. The court of appeals carefully recognized, however, that "[t]he absence in cable television of the physical re-

straints of the electromagnetic spectrum does not * * * automatically lead to the conclusion that no regulation of cable television is valid" (FCC App. 81). It correctly recognized that neutral regulations that do not seek to promote any point of view may be adopted to promote the right of the public to hear. See *Red Lion*, *supra*. But the record supporting such restrictions must show that they are justified by an important governmental interest. Cf. *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582 (D. D.C.), affirmed *sub nom. Capital Broadcasting Co.* v. *Acting Attorney General*, 405 U.S. 1000.

In this case, the record discloses no justification whatever for the Commission's no-advertising rule suppressing commercial speech in subscription cablecasts. See p. 15, *supra*. Cf. *Linmark Associates, Inc.* v. *Township of Willingboro*, No. 76-357, decided May 2, 1977; *Bates* v. *State Bar of Arizona*, No. 76-316, decided June 27, 1977. The same defect undermines the 90 percent restriction on the exhibition of feature films and sports material. As the court of appeals noted, "given the abundance of channels that cable systems can carry, plus the Commission's rules requiring governmental, educational, and public access channels on every cable system carrying broadcast signals, we do not understand the need to restrict feature film and sports programming time to create the technical conditions for diversity. Without further explanation of the function these rules are meant to serve, we cannot affirm the Commis-

sion's authority to promulgate them" (FCC App. 55-56; footnote omitted).

Insofar as the Commission contends that "siphoning" is the real problem, its argument is undermined by its own action withdrawing its regulations restricting the feature film material which cablecasters may show (see *supra*, pp. 10-11). And the record does not show a significant danger of siphoning with respect to the display of sports events (see *supra*, pp. 14-15). Moreover, measured against the problems which the Commission sought to resolve, the rules were far more restrictive than necessary and were therefore invalid on the ground that they "are grossly overbroad" (FCC App. 91). Thus, "the sports rules have the anomalous effect of reducing the number of non-specific games that can be shown on cable television at the same time that broadcasters are reducing the number of games they will show. * * * [T]his record reveals no reason to think that cutbacks represent siphoning any more than they represent editorial or commercial judgment. Where the First Amendment is concerned, creation of such a rebuttable presumption of siphoning without clear record support is simply impermissible" (*ibid.*; footnote omitted). Cf. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 124.

Petitioners broadly argue that the standards applied by the court of appeals require a degree of evidentiary support unsuited to the predicted estimates of harm which the Commission must undertake in adopting policies for the future. But even

prediction must rest upon a rational basis, lest it become sheer speculation. Petitioners do not demonstrate that the record sets forth evidentiary support for their broad legal contentions. Without such support, they are seeking only an abstract advisory opinion from this Court.

2. The Commission also seeks review of the court of appeals' holding that its cablecasting and subscription television rules may have been tainted by *ex parte* contacts. The Commission, however, does not contest Judge MacKinnon's concurring statement that "the rulemaking undeniably involved competitive interests of great monetary value and conferred preferential advantages on vast segments of the broadcast industry to the detriment of other competing business interests" (FCC App. 119). Because the rules have this characteristic and in effect define the conditions under which STV and pay cable service may be authorized, they were held to be subject to the same standards as those applied to the award of licenses and other valuable privileges. It has long been held to be inconsistent with fundamental administrative fairness for the Commission to entertain *ex parte* submissions, outside the context of the public rulemaking record, in proceedings relating to such subject matter. See *Sangamon Valley Television Corp.* v. *United States*, 269 F. 2d 221 (C.A.D.C.).

The opinion's broad statement that *ex parte* contacts should be barred in all rulemaking under 5 U.S.C. 553(b) once a notice of public rulemaking has been published need not be reviewed by this Court on

this record. The STV rules have been sustained subject to reexamination by the Commission of the effects of *ex parte* contacts. For the reasons set forth above, that reexamination is narrowly based and does not warrant review by this Court. The cablecasting rules were vacated on other grounds. As to them, if the Commission decides to conduct a new rulemaking, the majority's broad statement would simply be an appellate precedent to be considered in that rulemaking with other authorities discussing rulemaking procedure. The majority's broad statement does not appear to be the law of the circuit. It was joined only by one judge of the circuit and a district judge sitting by designation. In a subsequent decision, the court of appeals held that undisclosed *ex parte* contacts during the public comment stage of informal rulemaking were not prohibited in rulemaking that did not involve "'competing claims to a valuable privilege.'" *Action for Children's Television* v. *Federal Communications Commission*, C.A.D.C., No. 74-2006, decided July 1, 1977, slip op. 37. The panel in that case consisted of three circuit judges. Any differences among the judges of the District of Columbia Circuit concerning the appropriate standard for *ex parte* contacts in informal rulemaking should be initially resolved by that circuit on an appropriate record. See *Wisniewski* v. *United States*, 353 U.S. 901, 902.[11]

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[11] On August 24, 1977, the court of appeals denied a petition for rehearing with a suggestion for rehearing *en banc* in *Action for Children's Television, supra*, addressed to the *ex parte* issue.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN H. SHENEFIELD,
Assistant Attorney General.

BARRY GROSSMAN,
WILLIAM D. COSTON,
Attorneys.

SEPTEMBER 1977.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 246450 85

Supreme Court, U. S.
FILED
JUL 26 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

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OPPOSITION OF RESPONDENT NATIONAL CITIZENS COMMITTEE FOR BROADCASTING TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

HENRY GELLER
1785 Massachusetts Avenue, N.W.
Washington, D.C. 20036

CHARLES M. FIRESTONE
CITIZENS COMMUNICATIONS CENTER
1914 Sunderland Place, N.W.
Washington, D.C. 20036

Counsel for Respondent National Citizens Committee for Broadcasting

July 23, 1977

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
COUNTERSTATEMENT OF THE CASE	3
1. The Proceedings Leading to the FCC's 1975 Decision	3
2. The FCC's 1975 Decision	6
3. The Court of Appeals Decision	7
REASONS FOR NOT GRANTING THE WRIT	8
I. The Court of Appeals Properly Found That The Commission's Pay Cable Rules Are Arbitrary And Grossly Overboard	9
II. The Court of Appeals Correctly Found That The Ex Parte Presentations Were Improper In This Case	13
A. The Commission Failed To Notify The Public That Ex Parte Contacts Were Permissible	13
B. The Commission Clearly Violated The Sangamon Principle	14
C. The Ex Parte Activities Here Subverted The Basic Requirements Of The Administrative Procedure Act	16
D. The Commission's Failure to Reduce These Ex Parte Contacts To Writing And Place Them In The Docket Violated The Overton Park Requirement That The Whole Record Be Before The Reviewing Court	18
CONCLUSION	21

Page

CASES:

Action for Children's Television v. FCC (D.C. Cir. Case No. 74-2006 (Slip Op. July 1, 1977)), petition for rehearing filed July 15, 1977 ....9, 13, 14, 15, 16, 17, 18, 20, 21
Camp v. Pitts, 411 U.S. 138 (1973) 19
Chrysler Corp. v. Dept. of Transportation, 472 F.2d 659 (6th Cir. 1972) 19
Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 7, 8, 15, 18, 19, 20
City of Chicago v. FPC, 458 F.2d 731 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972) 19
Courtaulds, Inc v. Dixon, 294 F.2d 899 (D.C. Cir. 1961) 16
Duquesne Light Co. v. EPA, 522 F.2d 1186 (3rd Cir. 1975), *vacated on other grounds*. 427 U.S. 902 (1976) 19
Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976) 17
International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973) 17
Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C. Cir. 1973) 17
National Association of Independent Television Producers and Distributors (NAITPD) v. FCC, 502 F.2d 249 (2d Cir. 1974) 12
Portland Cement Assn. v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973) 17
Sangamon Valley Television Corp. v. United States, 358 U.S. 49 (1958) 14
Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959) 5, 7, 8, 14, 15
Van Curler Broadcasting Corp. v. United States, 236 F.2d 727 (D.C. Cir.), *cert. denied*, 352 U.S. 935 (1956) 16

ADMINISTRATIVE DECISIONS:

Home Box Office, 51 F.C.C. 2d 317 (1975) 10

COMMISSION RULEMAKING AND POLICY STATEMENTS:

CATV, First Report and Order in Docket No. 18397, 20 F.C.C. 2d 201 (1969) 3

Page

CATV, Memorandum Opinion and Order in Docket No. 18397, 23 F.C.C. 2d 825 (1970) 3
Cablecasting of Programs, Further Notice of Proposed Rule Making, 48 F.C.C. 2d 453 (1974) 5
Cablecasting—Program Charges, Notice of Proposed Rule Making and Memorandum Opinion and Order, 35 F.C.C. 2d 893 (1972) 3
Economic Relationship Between Television Broadcasting and Cable Television, Notice of Inquiry, Docket No. 21284, 42 Fed. Reg. 32825, June 28, 1977 14

STATUTES:

5 U.S.C. 552(a)(2)(B) 13
5 U.S.C. 553 (1970) 3, 8, 13, 16, 1a, 1b
5 U.S.C. 706(2)(A) 18, 19
28 U.S.C. 1254(1) 2
28 U.S.C. 2342(1) 19
28 U.S.C. 2347 19
47 U.S.C. 402(a) 19

AGENCY RULES AND REGULATIONS:

47 C.F.R. § 1.415(d) (1975) 13

MISCELLANEOUS:

Broadcasting Magazine, March 4, 1974, p. 6 4
Broadcasting Magazine, March 11, 1974, p. 5 4
Broadcasting Magazine, March 10, 1975, p. 6 6
Broadcasting Magazine, March 17, 1975, p. 10 6
Federal Rules of Appellate Procedure, 389 U.S. 1087 (1968), Rules 16-17 19
H. Rep. 94-800, Part II, 1975 U.S. Code, Cong. and Ad. News 2183 15
H. Rep. 483, 93d Cong., 1st Sess 11

Page

Remarks by Mr. Everett H. Erlich, Senior Vice President and General Counsel, ABC, before the ABC Television Network Affiliates, Los Angeles, May 10, 1974 4

N. L. Nathanson, Probing the Mind of the Administrator: Hearing Variations And Standards of Judicial Review Under The Administrative Procedure Act and Other Federal Statutes, 75 Colum. L. Rev. 721 (1975) 17, 19

N. L. Nathanson, "Report of the Special Committee of Ex Parte Communications In Informal Proceedings," June 24, 1977 at 1-2 15

Peck, Regulation and Control of Ex Parte Communications with Administration Agencies, 76 Harv. L. Rev. 233 (1962) 15

Pedersen, Formal Records and Informal Rulemaking, 85 Yale L. J. 38 (1975) 17, 19

Verkuil, Judicial Review of Informal Rulemaking, 60 Va. L. Rev. 185 (1974) 19, 20

Wright, The Courts and the Rulemaking Process: The Limits of Judicial Review, 59 Cornell L. Rev. 357 (1974) 18

Statement of FCC Chairman Richard Wiley in Hearings Before the Senate Subcommittee on Communications Senate Committee on Commerce, Science and Transportation, 95th Cong. 1st Sess., on "Oversight of Cable TV", June 6, 1977 8

Television Digest, February 18, 1974, pp. 1-2 4

Television Digest, March 4, 1974, pp. 1-2 4

Television Digest, March 10, 1975, p. 2 6

Television Digest, March 17, 1975, p. 3 6

Testimony of Mr. Everett H. Erlich At Hearings Before Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, on the Pay-Cable Television Industry, July 8, 1975 4

Page

Testimony of NCTA President David Foster At Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, on the Pay-Cable Television Industry, May 21, 1975 4

Testimony of Bowie Kuhn, Commissioner of Baseball, in Hearings Before Subcommittee on Communications, Senate Commerce, Science and Transportation Committee on "Oversight of Cable TV," June 7, 1977 11

Testimony of Vincent Wasilewski, president of National Association of Broadcasters, in Hearings Before Subcommittee on Communications, Senate Commerce, Science and Transportation Committee, May 10, 1975 11

IN THE

Supreme Court of the United States

No. 76-1724

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*

v.

HOME BOX OFFICE, et al., *Respondents*

No. 76-1841

AMERICAN BROADCASTING COMPANIES, INC., *Petitioner*

v.

HOME BOX OFFICE, et al., *Respondents*

No. 76-1842

NATIONAL ASSOCIATION OF BROADCASTERS, *Petitioner*

v.

HOME BOX OFFICE, et al., *Respondents*

OPPOSITION OF RESPONDENT NATIONAL CITIZENS COMMITTEE FOR BROADCASTING TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondent National Citizens Committee for Broadcasting (NCCB) respectfully urges this Court not to issue a writ of certiorari to the United States Court

of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals appears at FCC App. 1-115,[1] with the special concurring opinion of Judge MacKinnon at App. 117-122. It reversed and remanded the FCC's First Report and Order in *Subscription TV Program Rules,* 52 F.C.C. 2d 1, *reconsideration denied,* 54 F.C.C. 2d 794 (1975), which appears at FCC App. 123-218.

JURISDICTION

This Court's jurisdiction has been invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly found that there was no support in the record for the Commission's rules restricting film and sports programming presented over cable systems also carrying broadcast signals, and that these and related rules were arbitrary and violative of the First Amendment.

2. Whether the Court of Appeals correctly found that in a proceeding allocating valuable privileges among competing private parties, the Commission's procedures were flawed because the Commission violated its own rules and basic fairness by allowing *ex parte* presentations, and that these private discussions, particularly in the final decisional phase, made a sham

[1] References to the FCC's Petition or Appendix will be cited as "FCC Pet." or "FCC App."

of the public proceedings and resulted in a failure to have the full administrative record before the reviewing court.

STATUTES INVOLVED

Pertinent provisions of the Communications Act of 1934, as amended, are set forth in FCC App. I, pp. 251-252.

Section 553 of the Administrative Procedure Act is appended to this Opposition.

COUNTER-STATEMENT OF THE CASE

1. The Proceedings Leading to the FCC's 1975 Decision.

In 1969, the Commission issued a First Report and Order, finding that there should be no restrictions on program originations on cable.[2] Upon petitions for reconsideration filed by broadcast interests, the Commission imposed very restrictive rules allegedly to prevent pay cable from "siphoning off" programming presented over commercial TV.[3] The procedural and substantive propriety of this action was challenged by a number of parties, including the Department of Justice, in petitions for reconsideration. After two years delay, the Commission simply instituted a new proceeding (Docket No. 19554) but kept the restrictive rules in effect.[4]

[2] CATV, First Report and Order in Docket No. 18397, 20 F.C.C. 2d 201, 202, 205 (1969).

[3] CATV, Memorandum Opinion and Order in Docket No. 18397, 23 F.C.C. 2d 825 (1970).

[4] Cablecasting—Program Charges, Notice of Proposed Rule Making and Memorandum Opinion and Order, 35 F.C.C. 2d 893 (1972); FCC App. 18-19, n. 5; 30-32, n. 27.

In early 1974, the Commission, under then Chairman Burch, sought to complete action in the proceeding.[5] Because the Commission was "leaning" in its deliberations towards relaxing the existing rules, "with 'wildcard' rights for 'blockbuster' movies,"[6] American Broadcasting Companies' representatives contacted "key members of Congress", who in turn successfully pressured the Commission not to take such action.[7]

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[5] See *Television Digest*, March 4, 1974, pp. 1-2; *Broadcasting Magazine*, March 4, 1974, p. 6; *Television Digest*, February 18, 1974, pp. 1-2; *Broadcasting Magazine*, March 11, 1974, p. 5; FCC App. 94.

[6] *Television Digest*, March 4, 1974, p. 2; FCC App. 94. The "wildcard" provision would mean that cable or pay entrepreneurs could present a specified number of movies without regard to any restriction.

[7] *Ibid.* (Senators' ". . . action . . . was prompted by Hill visit by ABC Chmn. Leonard Goldenson and Pres. Elton Rule, whose only goal was to put halter on relaxation of pay-cable rules. . ."); *Broadcasting Magazine*, March 4, 1974, p. 6. See Remarks by Mr. Everett H. Erlich, Senior Vice President and General Counsel, ABC, before the ABC Television Network Affiliates, Los Angeles, May 10, 1974, p. 1:

> . . . As most of you know, the FCC just prior to Chairman Burch's sudden departure was on the verge of modifying Pay-TV rules applicable to movies by loosening the 2 and 10-year limitations. They were also considering adopting a so-called 'wild card' exception for 12 to 18 pictures a year which would have exempted entirely the most popular features from the application of any rule. We took the leadership in opposing these proposals with the result that key members of Congress made it known in no uncertain terms that they did not expect the Commission to act on such a far-reaching policy matter without a full complement and without first getting congressional guidance. The Commission got the message and has postponed for several months reconsideration of this particular issue.

See also Hearings before Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, on the Pay-Cable Television Industry, July 8, 1975, pp. 357-59 (testimony of Mr. Erlich); May 21, 1975, pp. 29, 41-42 (testimony of NCTA President David Foster). FCC App. 94.

The Commission then issued a further notice, calling for still more comments and another oral argument in October 1974.[8] In later 1974, the amicus below, Henry Geller,[9] as a part of an overall study involving the FCC's informal rulemaking proceedings, became aware of a serious legal issue concerning such proceedings—namely the Commission's present pattern of applying so-called *Sangamon* restrictions.[10] Accordingly, in December, 1974, Mr. Geller filed a petition calling for revision of the Commission's procedures, and specifically pointed out that pending proceedings like the pay cable one (Docket No. 19554) came within *Sangamon*.[11]

The Commission ignored this and two other communications from Mr. Geller urging that *ex parte* presentations be barred in the pay cable proceeding. As a result, in the crucial final decisional period after the last oral argument, industry representatives engaged in extensive private lobbying with the Commission decision-makers. Thus, information submitted to the court of appeals—by no means complete—showed that "during this period broadcast interests met some 18 times with Commission personnel, cable interests

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[8] Cablecasting of Programs, Further Notice of Proposed Rule Making, 48 F.C.C. 2d 453 (1974).

[9] The amicus is now the counsel to Respondent NCCB.

[10] Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959) (hereafter, Sangamon). As developed more fully within, Sangamon proscribes *ex parte* presentations for "conflicting private claims to a valuable privilege" in a rule making proceeding. *Id.* at 224.

[11] Mr. Geller suggested an expedited process of three weeks to comment on *ex parte* presentations that had been made. FCC App. 92-93, nn. 105, 107.

some nine times, motion picture and sports interests five times each and public interest intervenors not at all." (FCC App. 95-96.) The lobbying was particularly intense during the final weeks.[12]

2. The FCC's 1975 Decision.

In its March 1975 Report and Order, the Commission compromised among the contending industries. It relaxed somewhat the restrictions on pay cable's use of film material but still maintained substantial restrictions. (FCC App. 171-179). In the sports area, the Commission tightened the restriction on carriage of specific sports events, and adopted a complex formula for dividing the market for non-specific sports events between commercial TV and pay cable. (FCC App. 179-187.) The Commission continued without change the rule banning advertising on pay programs and limiting pay operations to no more than 90% to be devoted to feature films and sports. (FCC App. 188.) The Commission first modified its rule prohibiting pay cable from showing series-type programming and then deleted it. (FCC App. 187-88, 225-27.)

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[12] Thus, on March 10, 1975, the trade journals stated that "word of last week's changes . . . got out during the week, and both broadcaster and cable lobbyists rushed to the Commission, unhappy with some facets" (*Television Digest*, March 10, 1975, p. 2)—that broadcast representatives ". . . were calling on commissioners on Friday . . ." to oppose the changes (*Broadcasting Magazine*, March 10, 1975, p. 6). The following week, the trade press again reported that "various [industry] groups lobbied the Commission, pressing for changes in the tentative decision" (*Television Digest*, March 17, 1975, p. 3)—that National Association of Broadcasters ". . . staff members met with [FCC] Broadcast Bureau staffers to present data backing up asserted need for [more restrictive] standard" (*Broadcasting Magazine*, March 17, 1975, p. 10). FCC App. 94-95.

3. The Court of Appeals Decision.

The Court of Appeals found, *inter alia*, that there was no need shown for the regulations, and that the rules are "grossly overbroad." (FCC App. 60-75, 88-91, 97). As such, the Court below also held that the rules violate the First Amendment. (FCC App. 88-91.)

The Court also stated, based on the undisputed presentations of the amicus and an FCC submission describing preliminarily the *ex parte* contacts made in the proceeding, that it was ". . . particularly concerned that the final shaping of the rules . . . may have been by compromise among the contending industry forces . . .", rather than by exercise of the Commission's independent public interest judgment. (FCC App. 96.) It held that the *ex parte* presentations violated the Commission's own rules, the principles laid down in *Sangamon, supra*, and this Court's decision in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971). (FCC App. 96-106.) Judge MacKinnon filed a special concurring opinion joining only in the *Sangamon* ruling and differing with the majority's holding based on *Overton Park*. (FCC App. 117-122.) The Court remanded the record to the Commission "'to hold, with the aid of a specially appointed examiner, an evidential hearing to determine the nature and source of all *ex parte* pleas and other approaches that were made to' the Commission after the issuance of the Notice." (FCC App. 108.)[13]

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[13] Because the Court had found invalid the pay cable rules, the *ex parte* hearing is limited to the subscription TV (over-the-air pay) rules. FCC App. 107-08, 112, 246-49. But the Commission has moved to conform the two acts of rules. FCC Motion for Partial Stay of Mandate, filed April 18, 1977, at 9-10; FCC App. 248. If this Court denies certiorari or affirms the invalidity of the pay

REASONS FOR NOT GRANTING THE WRIT

On the merits, the crucial consideration is whether there is any need for these pay cable restrictions. On that issue, the Commission's position is a crumbling one, in almost total disarray. The Commission first modified its very restrictive 1970 rules, then abandoned its series rules, and now before this Court concedes that there is no basis for the film restrictions.[14] But as we show below, the sports rule is similarly lacking in record support, and is, if anything, even more arbitrary and patently protectionist of broadcasters than the now abandoned film rule. Significantly, the Commission lacks the support of the United States on the merits.

As to the procedural aspect, there are only three issues, each of which is dispositive of the case and none of which warrants further review by this Court: (i) whether the Commission followed its own rules; (ii) whether, on the facts here, the Commission violated the *Sangamon* principle; and (iii) whether, on the facts here, the Commission subverted the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. 553 (1970). The *Overton Park* issue, upon which the Commission so largely bases its petition, is a matter now in dispute before the Court of Appeals for the District of Columbia Circuit, and

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cable rules on any ground, the issue of the *ex parte* hearing becomes moot.

[14] Indeed, its Chairman has now acknowledged that even without the Court's reversal, the Commission would have removed the film restrictions. Statement of FCC Chairman Richard Wiley in Hearings Before the Senate Subcommittee on Communications, Senate Committee on Commerce, Science and Transportation, 95th Congress, 1st Session, on "Oversight of Cable TV" June 6, 1977, p. 26.

should be resolved first by that Court. See *Action for Children's Television* v. *FCC*, (D.C. Cir. Case No. 74-2006 (Slip Op. July 1, 1977)), *petition for rehearing filed July 15, 1977*. In any event, the reliance of the Court below on the *Overton Park* principle that the full administrative record must be before the reviewing court is sound, and requires no further review in the circumstances of this case.

I. The Court of Appeals Properly Found That The Commission's Pay Cable Rules Are Arbitrary And Grossly Overbroad.

The question as to availability of film to commercial television is *when*: Such film usually moves in sequence from theatres to pay TV to commercial TV. The Commission never established what public interest was involved in regulating this process of when film becomes available to commercial television. It sought to justify its rule largely on the so-called anti-siphoning ground—that pay cable must not be allowed to bid away films which would then become unavailable to the American people over commercial TV. Yet throughout these proceedings, the Commission has adopted irrational rules going far beyond any anti-siphoning purpose.

Thus, from 1970 to 1975, the Commission's rules were flagrantly protective of broadcasters. To give but one example, the Commission in 1975 admitted the obvious—that if a film has been sold to commercial TV, it is not siphoned (see FCC App. 173-174, ¶ 168), and therefore no Commission rule should bar its exhibition on pay TV. Yet for five years the Commission's rules did just that (*i.e.*, a film could not be shown on pay during the 2-10 year period after its general release, even if conventional TV were showing the same film a dozen times).

The Commission was strongly urged to discontinue this arbitrary protectionist policy, but while it modified the rules in 1975, it still employed many unnecessary restraints, solely to assist the commercial broadcasters. As the court below found, "examples of this are legion" (FCC App. 91).[15] The Commission has now conceded, because it has no answer to the patently arbitrary nature of its actions, in the film area.

[15] The following are just a few examples of the arbitrary nature of the Commission's film rule, set out at FCC App. 20-21:

> • A. Suppose a film were sold for theatre/cable exhibition for three years, and then sold to the network for exhibition to begin in the fifth year. Under the Commission's rule, the film could not be shown on pay in the fourth year, even though the film clearly has not been siphoned or unreasonably delayed in its conventional TV showing. The loss of this whole year of exhibition on pay is substantial, arbitrary, and a violation of the First Amendment as overbreadth. It markedly serves the broadcasters' private interest by eliminating any competition from pay during a substantial period for no valid reason, and by affording the broadcaster exclusivity (the fourth year in the above example) by Commission rule, rather than having to bargain and pay for it. See Home Box Office, 51 F.C.C. 2d 317, 318, 319 (1975).
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> • B. Suppose a film is sold to a network in its third year (after general release) for two showings over a two-year period; and then it is sold in syndication to a local station for five more showings over a three-year period. This film has not been "siphoned": It has been available to the local audience on conventional TV seven times in a five-year period. Yet for three more years—until the tenth year—the film could not be shown on pay.
>
> • C. Suppose a film is sold in the 3-10 year period for two years to a network for three prime time showings and then for five years to a local station for nine more showings (prime time, early show, late show). The film has now been available to the conventional TV audience 12 times over seven years. In the years 11-13 (since general release), the film is not available to pay under the Commission's rule (three years must pass since the last showing on commercial TV, and the film was shown in its 10th year). How can the Commission—concerned with anti-siphoning—justify a rule that precludes for a three-year period the pay cable showing of a film that has been available over commercial TV 12 times for the last seven years?

The Commission does seek review here of the sports rule, but significantly, it has not discussed in any detail the nature of the sports rule. For, upon analysis, that rule is shown to be as arbitrary and protectionist as its film counterpart. As a practical matter, the issue here is not the siphoning of major sporting event like the World Series or the Super Bowl,[16] but rather the treatment of non-specific events (*e.g.*, home or away baseball games). The 1975 rules provide that if less than 25 percent of the events in a sports category were broadcast live over commercial television in the market during the highwater mark season,[17] the number of events available for subscription exhibition will be the number of remaining games in highwater mark season. If, however, 25 percent or more of the events in a category were broadcast live over commercial tele-

[16] During hearings before the Subcommittee on Communications, Senate Commerce, Science and Transportation Committee, May 10, 1975 at 214-15, National Association of Broadcasters president Vincent Wasilewski testified that the NAB had no concern about the siphoning of national events, specifically citing the World Series and Super Bowl. In addition, sports entrepreneurs have asserted before the Commission and the Congress that they recognize the necessity to keep faith with the public by presenting these events on commercial TV; that as a practical matter, they are "locked in." See, *e.g.*, Testimony by Bowie Kuhn, Commissioner of Baseball, in Hearings before Subcommittee on Communications, Senate Commerce, Science and Transportation Committee on "Oversight of Cable TV," June 7, 1977 (Prepared Statement Appendix A, pp. 18-19.) Even assuming *arguendo* that they were to renege on these assurances, the effort to do so would be apparent years in advance of the actual occurrence, and Congress or the Commission could act to promptly preserve the status quo. *Cf.* Public Law 93-107 (the anti-blackout law, enacted in less than two months from initial hearings to signing). H. Rep. No. 483, 93d Cong., 1st Sess. (1973).

[17] The "highwater mark" season is that season among the preceding five seasons when the largest number of events in the relevant category were broadcast.

vision in the market during the highwater mark season, the number of events available for subscription exhibition is only 50 percent of the remainder games in the highwater mark season. (FCC App. 21-22, n. 8.)

The consequences of this arbitrary scheme are severe: If one assumes 80 away games in a baseball category, with 19 games on commercial television, pay could carry 61 games. But with 20 games (the 25 percent figure), pay would be cut to less than half the remaining 60 games, i.e., to 30 games. The other 30 games would be unavailable to the public. Commercial TV would not carry them because of a number of factors (*i.e.*, other popular fare; time or line problems associated with away games; the sports entrepreneur's judgment not to present too many home games or too many "free" TV games, etc.). Yet the public is denied the opportunity to see them on pay.[18]

NCCB submits that there is no more need for this Court to review whether the sports rule is arbitrary than to review the record basis of the film rule put before the Court by the broadcast petitioners. They both stem from the same protectionist mold, and reflect a compromise among the contending industry groups heavily weighted for the broadcasters and a "gloss-(ing) over (of) the more fundamental public interest." Cf. *National Association of Independent Television Producers and Distributers (NAITPD)* v. *FCC*, 502 F.2d 249, 257-58 (2d Cir. 1974).

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[18] Further, the events available for pay are to be reduced proportionally when the number of games conventionally televised is reduced from the previous season, even though, as the Court of Appeals correctly noted (FCC App. 91), "[T]his record reveals no reason to think that cutbacks represent siphoning any more than they represent editorial or commercial judgment."

II. The Court of Appeals Correctly Found That The Ex Parte Presentations Were Improper In this Case.

The Commission's procedures lent themselves to this compromise among the contending industries—to the patently arbitrary rules detailed above. For as the trade journals and the Commission's own submission reveals (Counterstatement, pp. 5-6), there was intense private lobbying by industry representatives during the final crucial decisional period. (FCC App. 94-96.) The Commission does not deny this. Rather, its position is one of demurrer—that any and all amounts of *ex parte* presentations in informal rulemakings under 5 U.S.C. § 553, even the flagrant pattern indicated here, are permissible. We submit that the court below correctly found such a pattern to be improper on a number of grounds, none of which warrant review by this Court.

A. The Commission Failed To Notify The Public That Ex Parte Contacts Were Permissible.

The procedure to be followed in this proceeding was specified in the Notice: It set forth the dates for filing comments and reply comments, and then employed the following phrase as the sole indication that *ex parte* contacts were permissible, "In reaching a decision in this matter, the Commission may take into account any other relevant information before it." (35 F.C.C. 2d at 899; FCC App. 101, n. 122). The Court of Appeals correctly held that this was too "cryptic" to meet the requirements of the Freedom of Information Act, 5 U.S.C. 552(a)(2)(B)(1970), that the public be given "an understanding of how an agency works" (FCC App. 101); and that the Commission accordingly violated its own rules, since absent the efficacy

of the above phrase, no additional comments or presentations were permissible. See *Sangamon Valley Television Corp.* v. *United States, supra,* 269 F.2d at 224-225; 47 CFR §1.415(d) (1975); but see *Action for Children's Television* v. *FCC, supra,* Slip. Op. 38, n. 31. Common sense indicates that only those versed in the arcane nature of the agency's processes would recognize the import of the cryptic phrase, and that many members of the public would remain wholly uninformed of the actual process.[19] In any event, this is not an issue warranting review by this Court.[20]

B. The Commission Clearly Violated the Sangamon Principle.

Sangamon, supra, was an informal rulemaking proceeding to allocate TV channels among several communities. When this Court learned that *ex parte* presentations had been made, it remanded the case to the Court of Appeals for a further hearing.[21] The Court of Appeals, agreeing with the Department of Justice,

[19] The Commission correctly states (FCC Pet. 43, n. 53) that public interest intervenors made some *ex parte* presentations but the number appears to be extremely low, particularly in comparison to the hundreds of such contacts by industry representatives. Thus, none of the Commissioners report *ex parte* presentations by public interest participants, with one exception—that of Mr. Geller (accompanied by two Rand Corporation employees) in September, 1974. But these same Commissioners indicate well over a hundred contacts by industry officials. See FCC submission to Court of Appeals, April 13, 1976.

[20] Significantly, the Commission, in a recent cable proceeding, has simply clarified the process by adding the phrase, "clearly, this is not a restricted proceeding." Economic Relationship Between Television Broadcasting and Cable Television, Notice of Inquiry, Docket No. 21284, 42 Fed. Reg. 32825, 32831, ¶ 26 (June 28, 1977).

[21] Sangamon Valley Television Corp. v. United States, 358 U.S. 49 (1958).

held that ". . . whatever the proceeding be called, it involved not only allocation of TV channels among communities but also resolution of conflicting private claims to a valuable privilege, and that basic fairness requires such a proceeding to be carried on in the open . . ."[22] That holding, the Court below stated ". . . so clearly governed the instant proceeding that there could be no question of the impropriety of *ex parte* contacts here." (FCC App. 102-103.)

The Commission does not argue that *Sangamon* is incorrect and should be reversed (FCC Pet. 37-41). Nor can it be seriously argued that *Sangamon* should be restricted to its own facts.[23] The Commission's arguments is that *Sangamon* should not be extended here because this proceeding is general in scope (FCC Pet. 40). But as the Court below unanimously held,[24] the pay cable proceeding, while an informal rulemaking

[22] Sangamon Valley Television Corp. v. United States, *supra,* 269 F. 2d at 224. Congress, in acting recently in this field, (Government in the Sunshine Act, 90 Stat. 1241 (1976)), specifically referred to the *Sangamon* principle with approval. See H. Rep. No. 94-800 Part II, 1975 U.S. Code, Cong. and Ad. News at 2228.

[23] For example, the *Sangamon* requirement would clearly have been applicable to the rulemaking proceeding determining color television standards. For that proceeding, while a rulemaking of general applicability, involved conflicting private claims to valuable privilege by two industry contenders, CBS and RCA. Peck, *Regulation and Control of Ex Parte Communications with Administrative Agencies,* 76 Harv. L. Rev. 233, 241 (1962).

[24] Accord: Action for Children's Television v. FCC, *supra,* Slip Op. 31-38. Unlike the *Overton Park* holding, discussed *infra,* there is no division within the circuit on the Sangamon issue, and it is therefore fully ripe for review by this Court. Nor is the Administrative Conference of the United States considering the Sangamon aspect of the *HBO* decision. N. L. Nathanson, "Report of the Special Committee on Ex Parte Communications In Informal Proceedings," June 24, 1977, at 1-2 (mimeographed).

of general applicability, involves conflicting private claims, pitting the cable/pay cable/film industries against the broadcast industry, for the valuable rights to exhibit film or sports over television.[25] There is, we submit, no need for this Court to review this crucial holding of the Court of Appeals.

C. The Ex Parte Activities Here Subverted The Basic Requirements Of The Administrative Procedure Act.

The requirements of the Administrative Procedure Act, 5 U.S.C. 553 (1970), for notice and opportunity to comment are not an invitation to a charade. They are clearly designed to initiate a genuine dialogue between the agency and the interested public. But in this case there was no meaningful dialogue because of the two-track nature of the process: public comments and oral argument, followed by a period of intensive *ex parte* presentations by industry representatives during the crucial decisional stage.[26] In these circumstances, the

[25] The Commission's reliance (Pet. 37-40) on Courtaulds, Inc. v. Dixon, 294 F. 2d 899 (D.C. Cir. 1961) is misplaced for the reasons stated by the Court below (FCC App. 103, n. 124). The FCC's reliance (Pet. 40) on Van Curler Broadcasting Corp. v. United States, 236 F. 2d 727 (D.C. Cir.), *cert. denied*, 352 U.S. 935 (1956), ignores the crucial consideration that unlike in *Van Curler*, the Commission here did consider the *ex parte* presentations in ". . . the action ultimately taken." *See* Action for Children's Television v. FCC, *supra*, Slip Op. 35-36.

[26] *See* Counter-Statement, *supra*, pp. 4-6 (FCC App. 95-96). Thus, Commissioner Robinson, who apparently kept records of all contacts, shows increased presentations in March, 1975, during the final crucial decisional period (i.e., March 4 (HBO); March 11 (NAB); March 14 (NBC)). Commissioner Hooks' report also reflects intensive industry lobbying during this period (i.e., March 11 (NCTA; NAB); March 14 (NBC); March 18 (Irving Kahn: Calif. Comm. TV Assn.)).

Court below correctly found that the Commission offers ". . . no facts at all that would tend to rebut the clear import of *amicus'* statements that *ex parte* contacts shaped the ultimate form of the pay cable rules . . ." (FCC App. 93, n. 107), and that the proceeding was accordingly vitiated. *Accord. Action for Children's Television* v. *FCC, supra,* Slip Op. 35-36, 38.

We are not suggesting that this would be so in the case of any *ex parte* presentation, at any stage, however minor or inconsequential. Rather, there is every indication that "compromises, fall-back positions and the so-called 'real facts' . . ."[27] were the subject of this intensive lobbying during the final crucial decisional stage.[28] Under *Portland Cement Assn.* v. *Ruckelshaus* 486 F.2d 375, 325-327 (D.C. Cir. 1973),[29] the public was entitled to know these important new arguments and to respond to them, since ". . . they may have materially

[27] This phrase is used by FCC Chairman Wiley in a 1974 speech deploring the "practice" of oral presentations continuing ". . . in the privacy of individual Commissioner and staff offices" after the oral argument in a rulemaking proceeding. (FCC App. 96-97, n. 117).

[28] *See* Counter-statement, pp. 5-6; FCC App. 96, where the Court below stated: "Our concern is heightened by the submission of the Commission's Broadcast Bureau to this court which states that in December 1974 broadcast representatives 'described the kind of pay cable regulation that, in their view, broadcasters "could live with."' "

[29] *See also* Ethyl Corp. v. EPA, 541 F. 2d 1, 48-53, 78, 85-86 (D.C. Cir. 1976); Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1258-59 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F. 2d 615, 649 (D.C. Cir. 1973); Pedersen, *Formal Records and Informal Rulemaking*, 85 Yale L. J. 38, 75-78 (1975); Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 Colum. L. Rev. 721, 762, 768 (1975).

influenced the action ultimately taken." *Action for Children's Television* v. *FCC, supra,* Slip Op. 35-36. Otherwise, the proceeding is simply a sham.

D. The Commission's Failure to Reduce These Ex Parte Contracts To Writing And Place Them In The Docket Violated The Overton Park Requirement That The Whole Record Be Before the Reviewing Court.

Because agencies are turning more often to informal rulemaking, the courts also are being called upon to review such agency actions and to lay down guiding principles.[30] In *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 416 (1971), this Court stated that in reviewing agency action to determine whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .," (5 U.S.C. §706(2)(A)), the court is not to substitute its judgment for that of the agency, but its "inquiry into the facts is to be searching and careful . . ."; and that this inquiry is to be based upon "the 'whole record' compiled by the agency . . ." (*Overton Park, supra,* 401 U.S. at 419).[31]

The Court below correctly held that in this case, it did not have the "whole record" in light of the crucial *ex parte* presentations previously discussed, and accordingly also remanded for further proceedings to obtain the "full administrative record." *Citizens to*

[30] *See* FCC App. 56-60; Wright, *The Courts and The Rulemaking Process: The Limits of Judicial Review,* 59 Cornell L. Rev. 375 (1974).

[31] Indeed, because the Court did not have the "whole record," it remanded for further proceedings to obtain just such a record. *Id.* at 419-420.

Preserve Overton Park, Inc. v. *Volpe, supra,* 401 U.S. at 420. The Commission argues (FCC Pet. 32) that *Overton Park* is limited to its particular factual situation—"informal action pursuant to a specific statutory mandate"—and has no applicability to informal rulemaking proceedings. But the holding of *Overton Park* that review must be based on the "whole record compiled before the agency" is not based on a particular statute or special situation. Rather, this Court made clear that this is ". . . the basis for review required by Section 706 of the Administrative Procedure Act . . ." *Overton Park, supra,* 401 U.S. at 419.[32] *Overton Park* is not some sport; it sets forth the guiding principles for review of informal rulemaking actions.[33]

Following *Overton Park* or the decision below does not eliminate the "dichotomy" between informal rulemaking on the one hand and adjudication and formal rulemaking on the other (FCC Pet. 30). The genius of informal rulemaking is its flexibility, particularly that there need be no evidentiary hearing with cross-

[32] The Judicial Review Act of 1950, governing review of agency action coming under Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. 402(a), similarly calls for the full record. *See* 28 U.S.C. 2342(1), 2347 (1970); Nathanson, op. cited n.29, at pp. 743-45. *See* also Rules 16 and 17 of the Federal Rules of Appellate Procedure, 389 U.S. 1087 (1968). Verkuil, Judicial Review of Informal Rulemaking, 60 Va. L. Rev. 185, 246 (1974) (". . . arbitrary and capricious review under the APA also requires a search of the whole record . . .").

[33] *See,* e.g., FCC App. 57; Camp v. Pitts, 411 U.S. 138, 142 (1973); Duquesne Light Co. v. EPA, 522 F.2d 1186, 1196 (3d Cir. 1975), *vacated on other grounds,* 427 U.S. 902 (1976); Chrysler Corp. v. Dept. of Transportation, 472 F.2d 659, 699-700 (6th Cir. 1972); City of Chicago v. FPC, 458 F.2d 731, 744 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 1074 (1972); Pederson, *Formal Records and Informal Rulemaking,* 85 Yale L. J. 38, 47-49 (1975).

examination of witnesses. Neither *Overton Park* nor the decision below changes that. Similarly, the agency may continue to go outside the record and to rely on its own expertise. All that these cases require is that the agency spread on the record important facts or presentations upon which it relied in reaching its decision. That requirement stems not from considerations of "sunshine", desirable as they may be, but the basic requirements for court review. See Verkuil, *Judicial Review of Informal Rulemaking,* 60 Va. L. Rev. 185, 248 (1974) (". . . there still is room for agency expertise to roam. All that is required is for the agency to say where it has been [by including in the whole record important factual information relied upon by the agency in formulating the rule.]")

While we urge that the Court below is clearly correct in its reliance on *Overton Park,* there is a further consideration militating against review by this Court at this time. On July 1, 1977, the panel in *Action for Children's Television* v. *FCC, supra,* issued its opinion, differing with the *Home Box Office* panel as to the requirements of *Overton Park* (Slip Op. 36-37).[34] There is now a petition for rehearing, with a suggestion for *en banc* consideration, pending before the Court of Appeals. Whether or not that petition is granted, or the issue is clarified in some later case, as it must eventually be, we suggest that this Court does not sit to settle conflicts between panels of a single circuit court. This is especially so in a case where the decision as to which review is sought is clearly correct on a number of other

[34] The Action for Children's Television (ACT) panel pointedly disagreed with the holding in Home Box Office quoted at FCC Pet. 29 (*See* ATC, *supra,* Slip Op. 30-31).

independent grounds. See *Action for Children's Television* v. *FCC, supra,* Slip Op. 31-33, 36, 38.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

HENRY GELLER
1785 Massachusetts Avenue, N.W.
Washington, D.C. 20036

CHARLES M. FIRESTONE
CITIZENS COMMUNICATIONS CENTER
1914 Sunderland Place, N.W.
Washington, D.C. 20036

Counsel for Respondent
National Citizens Committee for Broadcasting

July 23, 1977

APPENDIX

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Administrative Procedure Act. 5 U.S.C. § 553:

§ 553. RULE MAKING

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that no-

tice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.